

1                   AGREEMENT FOR THE REDEVELOPMENT AND RENOVATION OF  
2                   THE DURHAM NINTH STREET COMMERCIAL DISTRICT  
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5           **THIS AGREEMENT** (the “Agreement”), is dated as of \_\_\_\_\_, 2013 (“Effective  
6 Date”), between the **CITY OF DURHAM**, a North Carolina municipal corporation, (the  
7 “City”), and CPGPI REGENCY ERWIN, LLC (the “Company”), a limited liability company  
8 organized and existing under the laws of North Carolina, hereinafter collectively referred to as  
9 the “Parties”.

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11           **NOW, THEREFORE**, for and in consideration of the mutual terms and conditions  
12 hereinafter contained, and other good and valuable consideration, the receipt and sufficiency all  
13 of which are hereby acknowledged, the Parties agree as follows:  
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15   **1.0     BACKGROUND AND PURPOSE**  
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17           1.1     It is the policy of the City to aid and encourage the location of desirable business  
18 enterprises in the City of Durham which will increase the tax property base and/or add new jobs  
19 and business prospects to the City;  
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21           1.2     The Parties desire to enter into an agreement to further the redevelopment and  
22 renovation of the Ninth Street Commercial District to include the redevelopment of retail and  
23 commercial properties along the western portion of Ninth Street between Hillsborough Road and  
24 W. Main St. and on the south side of Hillsborough Road contiguous to the existing Station Nine  
25 residential complex and Erwin Square and to incorporate public streetscape improvements along  
26 the west side of Ninth Street.  
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28           1.3     In exchange for the Company’s private investment and in furtherance of the  
29 project, the City agrees to pay the Company for certain streetscape infrastructure improvements,  
30 which shall be part of the redevelopment and renovation project. The fees to be paid by the City  
31 to Company for the Streetscape Improvements pursuant to this Agreement have been found to be  
32 reasonable by the City. This agreement is entered into pursuant to Durham City Charter, Section  
33 108.1;  
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35           1.4     It is anticipated by the Parties that project improvements made pursuant to this  
36 Agreement will encourage the location of additional commercial businesses, enterprises and  
37 activities to the Ninth Street Commercial District and will encourage employment in Durham, all  
38 of which will increase taxable property, business prospects, sales tax revenues and economic  
39 conditions in Durham; and  
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41           1.5     The expenditure of public funds for the streetscape infrastructure improvements  
42 pursuant to this Agreement serves a public purpose.  
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**2.0 DEFINITIONS**

**2.1 Construction** -- shall mean the construction work activities necessary for the completion of the Ninth St. Redevelopment Project executed by means of entering into agreements with other persons. It includes new construction, reconstruction, repair, and renovation, and includes the purchasing, acquiring and renting of apparatus, supplies, materials and equipment as appropriate for that work.

**2.2 Construction Contract** -- shall refer to the contract between the Company and city approved Streetscape Contractor(s) for the Construction of the Streetscape Improvements.

**2.3 Street Lighting Cost** --the cost of replacing the existing Duke Energy street lights with street lighting approved by Duke Energy, the City and the North Carolina Department of Transportation (NCDOT). The Street Lighting Cost is \$239,019.79 based upon a plan and invoice from Duke Energy dated May 15, 2013, Project # 3902162. The Street Lighting Cost is included in the Streetscape Construction Cost.

**2.4 Engineer** -- shall refer to a professional engineer licensed to practice in North Carolina, whose services shall be engaged by the Company for the Streetscape Improvements renovation design and construction administration related work. The Engineer must be satisfactory to the City Manager in his reasonable discretion. Without limiting the choice of other persons or firms to qualify as Engineer, the City Manager has determined that The John R. McAdams Company, Incorporated, Inc. is satisfactory to serve as Engineer.

**2.5 Engineering Design Cost**. the cost for professional engineering and design services required to deliver all engineering design services necessary for the Construction of the Streetscape Improvements, including preliminary and final design, bidding and negotiation, and construction and post-construction administration.

**2.6 Engineering Design Services Budget** "Engineering Design Services Budget" is the maximum dollar amount available from the City to the Company to pay for the Engineering Design Costs. The Engineering Design Services Budget for the Streetscape Improvements shall be determined and negotiated by the Parties after the completion and review the preliminary engineering design phase, but, in any case, shall not exceed \$40,000. By mutual agreement of the Parties, the Engineering Design Services Budget may be increased, if necessary, however any such increase shall be offset by an equal decrease in the Streetscape Improvements Budget.

**2.7 Guaranteed Maximum Streetscape Price** -- shall refer to the maximum guaranteed cost to the City for the Streetscape Construction Cost offered by the Company (and/or its Streetscape Contractor) prior to commencement of Construction, subject to increase for change orders with prior written approval by the City. The Guaranteed Maximum Streetscape Price shall not be greater than the Streetscape Improvements Budget.

**2.8 Minimum Private Investment** -- shall refer to the minimum amount that the Company shall be required to invest or cause to be invested in the Private Development after the execution date of this Agreement, which amount shall include, by way of example but without

limitation, construction costs, tenant up-fit, furniture, fixtures and equipment, tenant allowances and leasing commissions, development fees, construction testing services, legal and consulting fees, and construction interest, points, commitment fees and other similar costs.

**2.9 Ninth St. Redevelopment Project** -- shall mean the redevelopment and renovation of the Ninth Street Commercial District to include the redevelopment of retail and commercial properties along the western portion of Ninth Street between Hillsborough Road and W. Main St. and on the south side of Hillsborough Road contiguous to the existing Station Nine residential complex and Erwin Square and the Streetscape Improvements.

**2.10 Maximum Public Investment** – shall mean the maximum dollar amount available from the City to the Company for all the Streetscape Improvement costs including the Engineering Design Services Budget and the Streetscape Improvement Budget. Based upon the preliminary scope of work for the Streetscape Improvements, the City estimates that the Maximum Public Investment amount will not exceed **\$807,864.79..**

**2.11 Preconstruction Services** – shall refer to construction management services, including the coordination and consultation among the Company, Engineer, Duke Energy, the NCDOT, Streetscape Contractor and City as necessary to plan, manage, and deliver the design and construction of the Streetscape Improvements for a Guaranteed Maximum Streetscape Price. A detailed description of Preconstruction Services is provided in Exhibit C, “Scope of Preconstruction Services.”

**2.12 Private Development** – shall mean the private investment improvements made directly by the Company or caused to be made by the Company comprising approximately 50,000 sq. ft. of new construction in the form of a retail grocery store, additional renovation of more than 25,000 sq. ft. of commercial and retail store improvements along Ninth Street and associated common area improvements for parking and landscaping.

**2.13 Streetscape Construction Cost** – the cost of Construction of the Streetscape Improvements, excluding the Engineering Design Costs.

**2.14 Streetscape Contractor** -- shall refer to a general contractor licensed under NC law with the appropriate classification for the work performed, approved by the Company to perform Construction work for the Streetscape Improvements. The Parties agree that the Construction work for the Streetscape Improvements may be performed by more than one prime Streetscape Contractor. The City approved Streetscape Contractor(s) shall be acceptable to the City Manager in his reasonable discretion. The approval or refusal to approve a Streetscape Contractor by the City Manager shall be based on the proposed Streetscape Contractor’s (i) status as a licensed general contractor in the State of North Carolina; (ii) experience on commercial construction projects of a similar nature; and (iii) experience on commercial construction/renovation projects approximately the same size as the Streetscape Improvements. Without limiting the choice of other persons or firms to qualify as a Streetscape Contractor, the City Manager has determined that Davidson and Jones, Inc. is satisfactory to serve as a Streetscape Contractor(s). Any reference in this Agreement to “a Streetscape Contractor,” “the Streetscape Contractor,” or “Streetscape Contractor(s)” shall be interchangeable to refer to

Davidson and Jones, Inc. or other City approved Streetscape Contractor(s). City approval of Streetscape Contractor(s) is not intended to apply to subcontractors used by an approved Streetscape Contractor.

**2.15 Streetscape Improvements** – shall refer to all work required for the completion of certain Construction (in accordance with the final design, drawings and plans and specifications prepared by the Engineer) to be made to and within the city/NCDOT-owned right-of-way along the west side of Ninth Street from W. Main St. to Hillsborough Rd, including, but not limited to: (a) demolition of sidewalk, curb & gutter, milling pavement for 1 1/2” depth west of the centerline of Ninth St.; (b) installation of sidewalk and brick pavers, 24” curb & gutter, driveways, curb cut ramps; (c) addition of new benches, trash cans, repaving, and restriping, resetting water meters, manhole adjustments, installation of drainage flumes, and utility box adjustment, and (d) removal and replacement of Duke Energy street lighting fixtures (performed by Duke Energy), as shall be more particularly described in the final, approved engineering drawings and specifications to be made a part of the Construction Contract. The Streetscape Improvements expressly excludes any work performed outside of the city/NCDOT owned right-of-way unless necessary in order to complete the Streetscape Improvements.

**2.16 Streetscape Improvements Budget** – shall refer to the maximum dollar amount available from the City to pay the Company for the Preconstruction Services and Streetscape Construction Costs. The Streetscape Improvements Budget includes all Construction costs associated with the Streetscape Improvements and Preconstruction Services, excluding the Engineering Design Services Budget. The Streetscape Improvements Budget is **\$767,864.79**. By mutual agreement of the Parties, the Streetscape Improvements Budget may be increased, if necessary, however any such increase shall be offset by an equal decrease in the Engineering Design Services Budget.

**2.17 Work** – shall refer to services rendered by or on behalf of the Company directly related to the Streetscape Improvements under this Agreement, including design and engineering work, Preconstruction Services and Construction of the Streetscape Improvements.

### **3.0 COMPANY AND CITY OBLIGATIONS**

**3.1 Private Development Construction.** The Company shall make or cause to be made a Minimum Private Investment of at least \$764,750.00 in renovation related investments in the Private Development. The Minimum Private Investment shall be made consistent with the Scope of Private Investment, attached hereto as Exhibit A. The Company shall submit all invoices, receipts, monetary obligations, etc., clearly evidencing the expense or cost incurred by the Company, which the Company wishes to qualify as a Minimum Private Investment under this Agreement. The Company shall complete all Minimum Private Investment in the Private Development within one (1) year after the date of execution of this Agreement subject to extension for force majeure, delays caused by the City and change orders approved by the City, or before Substantial Completion of the Streetscape Improvements, whichever is to occur last.

**3.2 Streetscape Improvements.** The Company covenants and agrees to cause to be performed the Construction and completion of the Streetscape Improvements as described

herein. In consideration for the Minimum Private Investment by the Company and the completion of the Streetscape Improvements by the Company, the City shall pay the Company the Guaranteed Maximum Streetscape Price pursuant to the terms of this Agreement, as payment for the costs of the Construction and completion of Streetscape Improvements.

3.2.1 Design Services. The Company shall enter into a contract with the Engineer to perform the necessary design and construction administration services for the Streetscape Improvements to include the sidewalk re-construction and repair, street and sidewalk lighting replacement and additions and other streetscape aesthetic upgrades along the west side of Ninth Street between Hillsborough Road and W. Main St.

3.2.1.1 City approval of Engineer's Scope of Services --In contracting for engineering design and construction administration services for the Streetscape Improvements, the Company shall first obtain approval of Engineer's scope of services from the City, in accordance with the procedures set forth in Section 12.15 below. The Engineering services shall be limited to the design and construction administration services for the Streetscape Improvement and shall be approved by the City Public Works Department and Transportation Department.

3.2.1.2 Design Deliverables -- Company shall cause the Engineer to prepare plans and specifications suitable and complete for the Construction of the Streetscape Improvements. The design standards and deliverables shall comply with the requirements of the City, Duke Energy (for lighting replacements) and the NCDOT. The City Manager or his designee shall have the right to review the plans and specifications at various stages of design. The Company shall allow the City Manager or his designee to review and approve the Engineer's design documents for the Streetscape Improvements at various phases of percent of completion determined by the City and approved by the Company. The City shall also have the right to review and approve other submittals, including site plan submittals, and stormwater submittals. All approvals herein described shall be obtained in accordance with the procedures set forth in Section 12.15 below.

3.2.2 Preconstruction Services. -- The Company shall provide Preconstruction Services necessary to deliver the Construction of the Streetscape Improvements for a not-to-exceed Guaranteed Maximum Streetscape Price. In order to deliver the Preconstruction Services, Company represents and warrants that it is qualified to provide, either on its own or through its Streetscape Contractor, the preconstruction services described in Exhibit C and Exhibit C-1 as necessary for the Company to deliver a Guaranteed Maximum Streetscape Price for the Streetscape Improvements. The Parties shall comply with the detailed Scope of Preconstruction Services, attached hereto as Exhibit C, in delivering the Guaranteed Maximum Streetscape Price.

3.2.3 Streetscape Improvements Construction. At the conclusion of the Preconstruction Services, the Company shall offer the City a Guaranteed Maximum Streetscape Price pursuant to the procedures outlined in Exhibit C. If the City Manager or his designee approves the Guaranteed Maximum Streetscape Price (such approval not to be unreasonably withheld,

conditioned or delayed) the City Manager or his designee shall request that the City Council accept the Guaranteed Maximum Streetscape Price and find that it is a reasonable price for the Streetscape Improvements. After City Council acceptance, the Company shall be given a Notice to Proceed pursuant to the schedule, plans and specifications devised pursuant to the Preconstruction Services procedures of Exhibit C. The Company shall assume all responsibilities for costs and expenses for the Construction of the Streetscape Improvements in excess of the Guaranteed Maximum Streetscape Price excluding changes in scope, systems, kinds and quality of materials, finishes or equipment which may be approved by the City and the Company and incorporated by change order to the Construction Contract between the Company and the Streetscape Contractor as herein defined, and by amendment of the this Agreement between the City and the Company. In the event the City Manager or his designee does not approve the Guaranteed Maximum Streetscape Price and/or City Council does not accept it, and the Parties cannot agree on a resolution to move the project forward, the City shall pay the Company an equitable amount for documented costs and charges of the Work performed, but excluding profit for the Company, up to the date of notice by the City that it will not agree to the Guaranteed Maximum Price, and this Agreement shall terminate and all obligations that are still executory on both sides are discharged except that any right based on prior breach or performance survives, and the indemnification provisions shall remain in force. Notwithstanding the city's obligations to pay the Company for costs and charges of the Work performed under such early termination, the total costs and charges of the Work performed shall not exceed the Engineering Design Services Budget and the Street Lighting Cost (if incurred by the Company) plus 1% of the Streetscape Improvements Budget.

3.2.4.1 Form of the Construction Contract. After completion of the Preconstruction Services and upon acceptance of the Guaranteed Maximum Streetscape Price by the City Council of both the Guaranteed Maximum Streetscape Price and scope of work, Company shall use its best efforts to enter into a Construction Contract with the Streetscape Contractor for construction of the Streetscape Improvements in accordance with the approved plans and specifications.

3.2.4.2 Required Payment and Performance Bonds. The Construction Contract shall be accompanied by a performance bond and a payment bond, in the forms generally accepted by the City for other construction projects or in such other form as is acceptable in the reasonable discretion of the City Manager. Each bond shall be at least in the dollar amount of the Construction Contract for the Streetscape Improvements. The performance bond shall be conditioned on the faithful performance of all of Company's obligations to the City under this Agreement for the Construction of the Streetscape Improvements and the faithful performance by the Streetscape Contractor(s) of all its obligations to the Company under the Construction contract. To the extent it is appropriate to make the performance bond enforceable and conditioned on the faithful performance of all of Company's obligations to the City for the Construction of the Streetscape Improvements under this Agreement and the Streetscape Contractor(s) obligation under the Construction Contract, Company shall cause the Streetscape Contractor(s) to become jointly and severally liable with Company on Company's

obligations to cause the construction of the Streetscape Improvements under this Agreement pursuant to the Construction Contract. The performance bond shall be written so as to protect the City as fully as though the City were entering into the Construction Contract directly. The payment bond shall be written so as to protect all persons who would be protected by the payment bond as fully as though the City were entering into the Construction Contract directly. The bonds shall be executed in conformance with Chapter 44A of the North Carolina General Statutes by one or more surety companies legally authorized to do business in North Carolina and which are reasonably satisfactory to the City Manager. Except to the extent, if any, that the Construction Contract explicitly and clearly supersedes any provision of this Agreement, it is agreed that none of this Agreement shall be deemed rescinded or canceled by the Construction Contract.

3.2.4.3 Failure to Enter into Construction Contract. If despite Company's reasonable efforts, Company is unable to enter into a Construction Contract by October 1, 2013, the City shall be permitted to bid out the Streetscape Improvements construction work in accordance with applicable bid law and enter into construction contract(s) for such work, but the following shall not be affected thereby: the obligations of the City and Company arising under this Agreement with respect to the services provided by the Engineer to design the Streetscape Improvements, including providing Preconstruction Services as is appropriate for the City to perform its obligations under this Agreement, and payment by the City for such services. All design and preconstruction phase documents shall be the property of the City and, if under this scenario such documents have not previously been provided to the City, the Company shall deliver all such documents to the City immediately upon request.

3.2.4.4 Unforeseen Conditions -- Company or City may, after acceptance by the City of the Guaranteed Maximum Streetscape Price prior to the commencement of or during Construction of the Streetscape Improvements and subject to the change order provisions of Section 3.2.4.6 below, certify in reasonable detail to the other party that a material condition exists that was not reasonably anticipated or foreseeable which may result in an adjustment to the Guaranteed Maximum Streetscape Price, either upward or downward, upon the written claim made by either party within fourteen (14) calendar days after the first appearance to such party of the circumstances. As a condition precedent to the City having any financial exposure to the Contractor for additional compensation or costs due to a material condition that was not reasonably anticipated or foreseeable, the Company must give the City and the Engineer written notice of, and an opportunity to observe, such condition prior to disturbing it. The failure by the Company to give the written notice and make the claim shall constitute a waiver by the Company of any rights arising out of or relating to such material condition that was not reasonably anticipated or foreseeable.

3.2.4.5 Project Management Oversight -- The Company shall have a designated Project Manager responsible for oversight of both the Engineer and the Streetscape Contractor during the Construction of the Streetscape Improvements. It is not required, however, that such Company Project Manager be present at the construction site at all times. At the City's expense and not included in the Streetscape Improvements Budget, the City shall have the right to maintain its field personnel or other designees at the construction site for such Construction to observe the Streetscape Contractor's construction, or to attend Company's or Company's Streetscape Contractor's meetings, if any, on the construction site. No such observation or attendance by personnel or designees of the City shall impose upon the City responsibility for failure by the Company, Engineer or the Streetscape Contractor to observe any laws or safety practices in connection with such construction or excuse Company's obligation to cause the City Streetscape Improvements to be constructed in accordance with the Streetscape Improvements plans and specifications.

.1 Neither the City's public representative nor project manager, if any, will have control over, will be in charge of or will be responsible for construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the work, since these are solely Company's and the Streetscape Contractor's responsibility. Additionally, neither the City's public representative nor project manager has authority to bind the City.

.2 The City may at any time and from time to time, without prior notice to or approval of Company or the Streetscape Contractor, replace the City's public representative or project manager, if any, with a new City representative. Upon receipt of notice from the City informing Company of such replacement and identifying the new City representative, Company shall recognize such person or firm as City's representative for all purposes under this Agreement.

.3 The City's public representative and project manager, if any, their consultants, and other persons authorized by City will at all times have access to the work wherever it is in preparation or progress. Company shall cause the Streetscape Contractor to provide safe and proper facilities for such access and for inspection.

.4 The City shall have the right to periodically conduct inspections and tests, at its own expense not included in the Streetscape Improvements Budget, on the work performed by the Streetscape Contractor using its own project manager, employees or a third party for the purpose of independently verifying compliance with the Streetscape Improvements plans and



specifications. If the Company or Streetscape Contractor unreasonably interfere with such inspection or tests after being given prior notice by the City of such test or inspection, the Company shall be responsible for added or extra costs resulting from such unreasonable interference.

.5 The presence of the City's public representative and project manager, if any, their consultants, and other persons authorized by the City at the construction site under this Subsection 3.2.4.5 shall not unreasonably interfere with the performance of the work by the Company, the Streetscape Contractor(s) and its subcontractors.

3.2.4.6 Change Orders – After acceptance by the City of the Guaranteed Maximum Streetscape Price prior to the commencement of or during Construction of the Streetscape Improvements the City or Company may request issuance of a change order. A change order is a written instrument prepared by the Engineer and signed by the City and Company, stating their agreement upon all of the following:

- .1 change in the original scope of Construction for the Streetscape Improvements;
- .2 the amount of the adjustment, if any, in the Guaranteed Maximum Streetscape Price;
- .3 the extent of the adjustment, if any, in the contract time for Streetscape Improvements completion.
- .4 the adjustment to the Guaranteed Maximum Streetscape Price and/or Streetscape Improvements Completion fully compensates the Company for the change.

3.2.4.7 Completion of the Streetscape Improvements by the City – If after conclusion of the engineering design services either (i) the Company is unable to secure a Construction Contract with a Streetscape Contractor by October 1, 2013; or (ii) the Company enters into a Construction Contract with a Streetscape Contractor, but the Company fails to complete the Streetscape Improvements Construction within the time period set forth in Section 4 below;

and under either scenarios (i) or (ii), the Company causes the Minimum Private Investment to occur within time frame described in Section 3.1.2 of this Agreement, the City shall be obligated to complete the Construction of the Streetscape Improvements pursuant to the approved final engineering design within reasonable conformance of the planned project schedule after adjustment for time delays caused by the failure of the Company to cause the Construction, and to pay the Company for documented costs and charges of the Work performed, but excluding profit for the Company, which total costs and charges of the Work performed shall not exceed the Engineering Design Services Budget

and the Street Lighting Costs (if incurred by the Company) plus 1% of the Streetscape Improvements Budget..

**3.3 City Made Third-Party Beneficiary and Indemnification.** The Company shall expressly provide that the City is a third-party beneficiary in any contract between the Company and any entity performing design or Construction related work on the Streetscape Improvements, including the contract between the Company and the Engineer and between the Company and the Streetscape Contractor. The Company shall ensure that any entity with which the Company contracts for Streetscape Improvements related work shall indemnify, hold harmless, and defend the City to at least the same extent that the contracting entity agrees to indemnify, hold harmless, and defend the Company.

**3.4 Intention to Enter into Parking Lot Lease Agreement.** In association with this Agreement, the Parties continue to negotiate a lease agreement whereby the City will lease the surface parking lot adjacent to the proposed Streetscape Improvements before their completion. The Company and City agree to continue in good faith any remaining negotiations necessary to finalize such lease agreement.

#### **4.0 PROVISION FOR NONPERFORMANCE**

Should the Company fail to substantially complete or cause to be completed the renovations of the Streetscape Improvements in accordance with the approved scope of work and final design provided in this Agreement within 1 year from the Effective Date, subject to extension for force majeure, delays caused by the City and change orders approved by the City, then within 30 days thereafter the City shall have the right to terminate the Company's services in connection therewith, the Company shall reimburse the City for any fees paid in excess of the fees earned for services performed or Work completed prior to the date of termination, this Agreement shall terminate, and the parties shall have no further rights, duties or obligations under this Agreement, except for any which specifically survive termination.

#### **5.0 COMPENSATION TO COMPANY FOR WORK**

**5.1 Payment of Preconstruction Services.** The Company shall be paid for the Preconstruction Services performed by the Company, if any, based upon evidence of actual costs and expenses incurred by the Company after providing an appropriate invoice to the City including supporting documentation reasonably required by the City. The Company shall submit its invoice and request for payment of the Preconstruction Services cost when it proposes the Guaranteed Maximum Streetscape Price to the City. The cost of the Preconstruction Services shall not exceed 1% of the Guaranteed Maximum Streetscape Price. The cost of Preconstruction Services shall be paid by the City as a lump sum at the time the Company offers the City the Guaranteed Maximum Streetscape Price proposal pursuant to Exhibit C.

**5.2 Payment of Engineering Design Costs.** The City shall pay the Company the Engineering Design Costs for the engineering services provided not-to-exceed the Engineering Design Services Budget pursuant to this Agreement beginning after execution of this Agreement as such Engineering Design Costs are incurred from time to time, but not more often than

monthly. The Company shall submit a written request and invoice for payment by the City, indicating the actual engineering design services incurred and the amount requested for reimbursement, together with supporting information reasonably required by the City to evidence the Engineering Design Costs performed as of the date of the Company's request for payment, and the City shall remit payment within forty-five (45) days thereafter.

**5.3 Payment of Streetscape Construction Costs.** After the City has accepted the Guaranteed Maximum Streetscape Price proposal pursuant to Section 3.3.3 herein, the Company shall be paid for the Streetscape Construction Costs as such Construction of the Streetscape Improvements progresses. From time to time, but not more often than monthly, the Company may submit a written request and invoice for payment by the City, indicating the level of completion of the Work and the amount requested for reimbursement, together with supporting information reasonably required by the City to evidence the cost of the Work performed as of the date of the Company's request for payment, and partial lien waivers from the Engineer and/or the Streetscape Contractor relating to the completed portion of such Work, and the City shall remit payment within forty-five (45) days thereafter.

## **6.0 ADDRESS FOR PAYMENT**

The payment by the City to the Company pursuant to this Agreement shall be mailed to:

c/o Regency Centers  
2068 Clark Avenue  
Raleigh, North Carolina 27605  
Attn: David Smith

or to such other address as the Company may specify by written notice to the City.

## **7.0 NOTICES CHANGE OF NOTICE INFORMATION**

**7.1** Except for payments to the Company, all notices, documentation and other communications required or permitted by this Agreement shall be in writing and shall be given either by personal delivery, fax or certified United States Mail, return receipt requested, addressed as follows:

To the City:

Director of Public Works  
Public Works Department  
City of Durham  
101 City Hall Plaza  
Durham, North Carolina 27701  
Fax: 919-560-4316  
[Email: Marvin.Williams@durhamnc.gov](mailto:Marvin.Williams@durhamnc.gov)

With a copy to:

Director of Economic and Workforce Development  
Office of Economic and Workforce Development  
City of Durham  
101 City Hall Plaza  
Durham, North Carolina 27701  
Attn: Kevin Dick  
Fax: 919-560-4986  
Email: Kevin.Dick@durhamnc.gov

To the Company:

Regency Centers  
2068 Clark Avenue  
Raleigh, North Carolina 27605  
Attn: David Smith  
Fax: \_\_\_\_\_  
Email: [davidsmith@regencycenters.com](mailto:davidsmith@regencycenters.com)

With a copy to:

Chartwell Property Group  
2600 Fairview Road  
Suite 210  
Raleigh, North Carolina 27608  
Attn: Jack Dunn  
Fax: (919) 678-0801  
Email: jack.dunn@cpgre.com

**7.2** A change of address, fax number or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this Agreement shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

## **8.0 EXHIBITS**

The following exhibits are made a part of this contract:

Exhibit A	“Scope of Private Investment”
Exhibit B	Omitted
Exhibit C	“Scope of Preconstruction Services”
Exhibit C-1	“Sales Tax Reimbursement Form”
Exhibit D	“Insurance Requirements for Streetscape Improvements Design”

Exhibit E “Insurance Requirements – Streetscape Improvements Construction”  
Exhibit F “Workforce Development Plan”

In case of conflict between an exhibit and the text of this contract excluding the exhibit, the text of this contract shall control.

## **9.0 INTENTIONALLY OMITTED**

## **10.0 INSURANCE**

**10.1 Insurance by Engineer.** The Engineer shall maintain the insurance shown in Exhibit D (“Insurance Requirement for Streetscape Improvements Design”) beginning after the date of this Agreement but before the Engineer provides any services described in this Agreement and shall maintain that insurance continuously until 3 year after completion of the Engineer’s services.

**10.2 Construction Insurance.** The Streetscape Contractor shall maintain the insurance listed in Exhibit E (“Insurance Requirement – Streetscape Improvements Construction”).

## **11.0 INDEMNIFICATION**

**11.1 Definitions.** In this Section 11.0, the following definitions shall apply:  
“Claims” are claims, losses, damages, liabilities, fines, penalties, fees, royalties, costs, demands, actions, suits, and judgments of any kind or nature whatsoever, whether at law or in equity, including court costs and reasonable attorney’s fees assessed as part of any of said items.  
“Persons Connected with Company” are Company’s officers, members, managers, board members, employees, agents, contractors, subcontractors of all tiers, and invitees, but excluding the City.

**11.2 Indemnification by Company.** “City Indemnitees” are defined as City, its officers, officials, employees, agents, and independent contractors, but excluding Company. Company shall indemnify, defend, and hold harmless the City Indemnitees from and against all Claims arising out of, relating to, or resulting from acts or omissions by Company or Persons Connected with Company arising out of, relating to, or resulting from the Company’s obligations with respect to this Agreement. Without limiting the preceding sentence, and as an additional obligation of Company, it is agreed that Company shall indemnify, defend, and hold harmless the City Indemnitees from and against all Claims made by independent contractors, including subcontractors of all tiers, where the independent contractor was engaged by Company to perform work pursuant to this Agreement, except to the extent the Claim is the result of a negligent or wrongful act or omission by any of the City Indemnitees. In performing its duties under this Section 11.2, Company shall defend City Indemnitees with legal counsel reasonably acceptable to City. This provision is not intended to extend any warranty periods during which time the City may file claims against the Company or the Streetscape Contractor regarding the Streetscape Improvements.

**11.3 Survival.** This Section 11.0 shall remain in force despite termination of this Agreement with respect to acts and omissions occurring before termination of this Agreement (whether by expiration of the term or otherwise) and termination of the services of Company under this Agreement.

## **12.0 MISCELLANEOUS PROVISIONS**

**12.1 EEO Provisions.** Company agrees that it will require its direct contracts with the Streetscape Contractor and the Engineer to require that those entities: (1) shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. The Company shall take affirmative action to insure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. Such action shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. (2) shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions. (3) shall state, in all solicitations or advertisement for employees placed by or on behalf of such entities, that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. (4) shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding. (5) In the event of the Company's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this Agreement, in whole or in part, and the City may declare the Company ineligible for further City contracts. (6) Unless exempted by the City Council of the City of Durham, the Company shall cause the Streetscape Contractor and the Engineer to include these EEO provisions in every purchase order for goods to be used in performing this Agreement and in every subcontract related to this Agreement so that these EEO provisions will be binding upon such subcontractors and vendors.

**12.2 City Policy.** THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

**12.3 Choice of Law and Forum.** This Agreement shall be deemed made in Durham County, North Carolina. This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina. The exclusive forum and venue for all actions arising out of this Agreement shall be the North Carolina General Court of Justice in Durham County. Such actions shall neither be commenced nor removed to federal court. This section shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

643       **12.4    Principles of Interpretation and Definitions.** In this Agreement, unless the  
644 context requires otherwise (a) the singular includes the plural and the plural the singular. The  
645 pronouns “it” and “its” include the masculine and feminine. References to statutes or regulations  
646 include all statutory or regulatory provisions consolidating, amending, or replacing the statute or  
647 regulation. References to contracts and agreements shall be deemed to include all amendments  
648 to them. The words “include,” “including,” etc. mean include, including, etc. without limitation;  
649 (b) references to a “Section” or “section” shall mean a section of this Agreement; (c) “Contract”  
650 and “Agreement,” whether or not capitalized, refer to this instrument; (d) titles of sections,  
651 paragraphs, and articles are for convenience only, and shall not be construed to affect the  
652 meaning of this Agreement; (e) “Duties” includes obligations; (f) the word “person” includes  
653 natural persona, firms, companies, associations, partnerships, trusts, corporations, governmental  
654 agencies and units, and other legal entities; (g) the word “shall” is mandatory; and (h) the word  
655 “day” means calendar day.

656  
657       **12.5    Waiver.** No action or failure to act by either party hereto shall constitute a waiver  
658 of any of its rights or remedies that arise out of this Agreement, nor shall such action or failure to  
659 act constitute approval of or acquiescence in a breach thereunder, except as may be specifically  
660 agreed in writing.

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662       **12.6    Performance of Government Functions.** Nothing contained in this Agreement  
663 shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising  
664 or performing any regulatory, policing legislative, governmental, or other powers or functions.

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666       **12.7    Severability.** If any provision of this Agreement shall be unenforceable, the  
667 remainder of this Agreement shall be enforceable to the extent permitted by law.

668  
669       **12.8    Assignment; Successors and Assigns.** Without the City’s written consent, the  
670 Company shall not assign (which includes to delegate) any of its rights (including the right to  
671 payment) or duties that arise out of this Agreement. The City Manager may consent to an  
672 assignment without action by the City Council. Unless the City otherwise agrees in writing, the  
673 Agreement and all assignees shall be subject to all of the City’s defenses and shall be liable for  
674 all of the Company’s duties that arise out of this Agreement and all of the City’s claims that arise  
675 out of this Agreement. Without granting the Company the right to assign, it is agreed that the  
676 duties of the Company that arise out of this contract shall be binding upon it and its heirs,  
677 personal representatives, successors, and assigns.

678  
679       **12.10   Compliance with Law.** In performing all of its obligations under this  
680 Agreement, the Company shall comply with all applicable laws and ordinances.

681  
682       **12.11   No Third Party Rights Created.** This Agreement is intended for the benefit of  
683 the City and the Company and not any other person.

684  
685       **12.12   Modifications; Entire Contract.** A modification of this Agreement is not valid  
686 unless signed by both parties and otherwise in accordance with requirements of law. Further, a  
687 modification is not enforceable against the City unless the City manager or a Deputy or Assistant  
688 City Manager signs it for the City. This Agreement contains the entire agreement between the

parties pertaining to the subject matter of this Agreement. With respect to that subject matter, there are no promises, contracts, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this Agreement.

**12.13 City's Manager's Authority.** To the extent, if any, the City has the power to exercise the City's rights and remedies under this Agreement that power may be exercised by the City Manager or a Deputy or Assistant City Manager without City Council action.

**12.14 I Workforce Development Plan.** In cases where contracts are \$200,000.00 or greater, the Developer shall comply with the Workforce Development Plan attached as Exhibit I to the extent allowed by applicable law. The Developer shall submit to OEWD of the City complete and accurate quarterly reports as contained in Exhibit F. The Developer shall submit a report at least once every six months to the City showing that it has made progress implementing the Plan. If a report is not submitted on time or if a report fails to show compliance with the Plan, the City shall have the right to withhold payments to the contractor or subcontractor.

**12.15 Approval Procedure between the Parties.** When a party hereto is herein given the right to consent to or approve any document, plan, specification, proposed action or Work in accordance with the provisions of this Agreement, the following procedures shall be followed:

- .1 Such document or a written description of the proposed action or work requiring consent or approval shall be submitted by the party having responsibility therefor (the "Requesting Party") in accordance with the notice requirements of Section 7.0, to the party having the right of consent or approval.
- .2 Within 7 calendar days after the receipt of any written notice requesting consent or approval, the party having the right of consent or approval shall notify the Requesting Party in writing of its consent or approval or of its specific objections to the documents, proposed action or Work.
- .3 Failure to respond with the specific objections within the maximum time period specified herein shall constitute the written consent or approval of the matters contained in the notice requiring approval or consent.
- .4 In order to avoid any delay in the design and completion of the Streetscape Improvements, it is the intention of the parties that all changes or other matters affecting the schedule and budget for the Streetscape Improvements shall be reviewed, approved and handled in the most expeditious manner possible.
- .5 Except in situations where it is stipulated that approval or consent may be granted or withheld in the sole discretion of the party from whom approval or consent is requested, such approval and consent shall not be unreasonably withheld, conditioned or delayed.



*Agreement for the Redevelopment and Renovation of the Durham  
Ninth Street commercial District*

IN WITNESS WHEREOF, the City and the Company have caused this Agreement to be  
executed under seal themselves or by their respective duly authorized agents or officers.

*[SIGNATURES APPEAR ON FOLLOWING PAGE(S)]*

*Agreement for the Redevelopment and Renovation of the Durham  
Ninth Street commercial District*

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**CITY OF DURHAM**

ATTEST:

\_\_\_\_\_  
By:\_\_\_\_\_

Preaudit Certification:

*Agreement for the Redevelopment and Renovation of the Durham  
Ninth Street commercial District*

**COMPANY**

CPGPI REGENCY ERWIN, LLC  
a North Carolina limited liability company

By: REGENCY CENTERS, L.P.  
a Delaware limited liability company, its Manager

By: REGENCY CENTERS CORPORATION,  
its General Partner

(Affix corporate seal)

By \_\_\_\_\_

Acknowledgement by CPGPI REGENCY ERWIN, LLC:

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

I, a notary public in and for the aforesaid county and state, certify that \_\_\_\_\_  
\_\_\_\_\_ personally appeared before me this day  
and stated that he is \_\_\_\_\_ of REGENCY CENTERS CORPORATION,  
in its capacity as General Partner of REGENCY CENTER, L.P., a Delaware limited liability company, in  
its capacity as Manager of CPGPI REGENCY ERWIN, LLC a North Carolina limited liability company,  
and that by authority duly given and as the act of the company, he signed the foregoing Amendment with  
the City of Durham and the corporate seal was affixed thereto.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

My commission expires:

\_\_\_\_\_  
Notary Public

(NOTARIAL SEAL)